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¹⁷ For purposes of this Petition, Landowners will use the names of parties ascribed to them in earlier stages of this proceeding.

vigorously disputed by the adverse parties, announced principles inconsistent with its own regulations and decisions, made factual findings wholly inconsistent with the record in this case, and denied without adequate justification Landowners' request for an investigation that would have permitted the Board to make factual findings and adopt legal conclusions based on substantial evidence of record sworn to and subjected to cross examination. In this, the Board's decision involves material error. As a result, Landowners respectfully ask that the Board reconsider its March 19 decision and either reverse the legal conclusions it announced therein or institute the investigation Landowners have requested so that the validity of the Board's legal conclusions and the essential facts offered in support of them can be tested.

BACKGROUND

This case involves a dispute between Landowners whose property was given or taken decades ago as the railroads expanded their networks across and around our nation and successors-in-interest to those railroads. The present dispute is similar, if not identical, to situations that have arisen many times in many different locations around the nation.

History shows that at some time in the nineteenth century, a predecessor of CSX Corporation and the Seaboard System Railroad acquired a right-of-way over property owned by citizens of South Carolina and used that right-of-way to establish and conduct rail transportation between Yemassee and Port Royal, South Carolina. The acquisitions of rights-of-way by the railroads occurred in different ways. In some cases, a railroad would purchase the real estate over which it wanted to conduct rail operations. But typically, as in the case at hand, the legal authority acquired by the railroad would be no more than a right-of-way. The right-of-way would provide that the railroad could use the real estate as long as rail operations were conducted over it.

but, at such time as those operations were terminated, the railroad's interest in the property would end and ownership and control of the property would revert to the landowner

Under legislation enacted by Congress and regulations adopted by the Board and its predecessor, a national policy developed that clearly favored the retention of railroad rights-of-way under federal jurisdiction even after rail operations over the right-of-way had been terminated, perhaps beyond the time the original landowners may have expected to have been able to exercise their reversionary rights and reclaim their property. But that national policy, as strong as it was, did not extinguish landowners' rights altogether. If the need for rail services over a right-of-way diminished substantially and steps were taken to permit the railroad to avoid the cost of continuing operations over the line, it was always possible for the landowner ultimately to be able to reclaim its land. To be certain, new ways and means were developed to defer that time while other alternative uses of the property were considered and pursued, but it was always within the contemplation of federal law that a time could come when no further federal interest in the property would remain and the land could be reclaimed by its owners.

This case represents the classic dispute between landowners and the holders of railroad rights-of-way which have burdened their property. In this case, Landowners contend that the last of the almost endless number of barriers standing between them and their reversionary interests has been breached and the interests of those who trace their right to use Landowners' property to the rights-of-way granted to the railroads decades ago have come to an end. Landowners assert that the Board should confirm that the federal interest in their property, as broadly defined as it has become, has terminated, that Board jurisdiction over the property has ended, and that Landowners are entitled to enforce the reversionary interest they retain. The Board's March 19 decision, reaching a contrary result, should be reconsidered and reversed.

ARGUMENT

This case arises under Subpart C of 49 C.F.R. Part 1150. Part 1150 governs the institution, termination and abandonment of rail operations over rail properties, among other things, and Subpart C of Part 1150 contains the Board's special rules governing a subset of those matters applicable to lines of railroad conveyed to a State when the rail lines have been abandoned or approved for abandonment by the Board or the Interstate Commerce Commission, its predecessor.

It is undisputed that, in 1984, the subject line of railroad was approved for abandonment by the I.C.C. and was subsequently acquired from Seaboard by an instrumentality of the State of South Carolina. In 1985, Tangent Transportation Company, a wholly-owned subsidiary of the state instrumentality that acquired the line from Seaboard, instituted rail operations over the line under a modified certificate. In 2003, Tangent filed its 60-day notice of intent to terminate service over the line and served that notice on the State in accordance with the provisions of Subpart C of Part 1150.

Landowners contend that upon expiration of the 60-day period following the filing of Tangent's notice of intent to terminate, the Board's jurisdiction over the line came to an end and Landowners' rights to exercise their reversionary interests were fully in effect. Landowners assert further that, because the Board's jurisdiction over the line ended in 2003, the Board should not have entertained the notice for a modified certificate of public convenience and necessity. BRC filed three years later, and the Board should not have issued a modified certificate notice to BRC.

Landowners' contention is supported by the clear language of Subpart C of Part 1150, is fully consistent with decisions of the Board describing the purpose and scope of the procedures set forth in Subpart C, and was expressly embraced by an official of the Board itself.²⁷

While the decision acknowledges that lines subject to Subpart C "can be abandoned, and once they are, they are no longer part of the national rail transportation system and are beyond the Board's jurisdiction," Decision, pages 5-6 with citations, the Board declared that it could not conclude that abandonment had occurred in this case unless it could find an adequate demonstration of intent to abandon by the owner of the line, the State of South Carolina. The Board first concluded that the filing of the 60-day notice by Tangent, the operator of the line, was not an adequate expression of intent by the State of South Carolina, the owner of the line, to abandon the line because the notice had been filed by Tangent, the operator, not by the State, the owner. The Board then found that it was not able to find any other evidence in the record demonstrating the State's intention to abandon and concluded that abandonment had not occurred.²⁸ Landowners contend the Board's decision is wrong on both scores

First, Tangent was the State of South Carolina within the clear meaning of Part 1150.21 which defines "State" to include "States, political subdivisions of States, and all instrumentalities through which the State can act " Tangent was, as the Board itself concedes (Decision, pages

²⁷ When asked about the Board's interest in this very line in 2004, the official responded "[t]he line has passed out of our jurisdiction at the time of the abandonment so we no longer have any interest in it." BRC Reply, February 6, 2007, Attachment C, p. 7

²⁸ Nowhere in its decision did the Board address the declaration of its official that "[t]he line has passed out of our jurisdiction at the time of the abandonment so we no longer have any interest in it."

1-2), "a wholly owned subsidiary of SCPRC" which the Board describes as "a part of the State of South Carolina Division of Public Railways." It must, therefore, be concluded that Tangent was an instrumentality of the State "through which the State can act " As a result, it must also be concluded that the filing of the notice to terminate by Tangent was the act of the State and a clear statement by the State, the owner, of its intention to abandon the line ²⁷

The Board is also in error as it moved to the second leg of its analysis and purported to examine "all the facts and circumstances to determine the line owner's intent" with respect to the line and to consider "traditional factors to determine the intent of a state rail line owner to abandon the line " Decision, page 6

As noted, an analysis of "traditional factors" was not required here as Tangent's notice effectively resolved any question as to the State's intent. But, if the Board were to undertake an analysis of other factual matters to determine the State's intent to abandon, it should have done so based on evidence and argument presented by all interested parties. Notwithstanding that, the Board undertook to determine the State's intent to abandon through a very limited examination of what it thought the State had done to protect and preserve the line after Tangent filed its 60-day notice.

The findings adopted by the Board make clear that the type of inquiry the Board conducted was inadequate. There is nothing in the record to support the Board's conclusion that, through its actions to preserve and maintain the line, the State adequately demonstrated its intent

²⁷ The record is silent with respect to the knowledge and/or participation of the South Carolina Public Railways Commission, the South Carolina State Ports Authority or any other State representative in the filing of the notice by Tangent.

to retain it. And, contrary to the Board's findings, Landowners and other interested parties did, in fact, challenge the evidence the Beaufort Parties introduced to the extent they were able to do so. Indeed, it was because of the very limited and inadequate factual record available to the Board that Landowners urged the institution of an investigation so that the Board could, among other things, review allegations that BRC had introduced into evidence to test their validity.

There are limits on the ability of Landowners and other interested parties on their own to develop evidence regarding the condition of the line and what the State has done to maintain it. Until they can perfect their reversionary interests, Landowners do not have adequate legal authority to enter upon real estate comprising the right-of-way and to examine the entirety of the rail line -- the rail, the ties, the road bed and other facilities comprising the line the Board has to evaluate. Nevertheless, they have had some opportunities to see parts of the line and they know that the State could not testify that it has "retained the tracks and ties in place" or that "it has maintained [the tracks and ties] in a state of readiness for service" or that it has "maintained and repaired cross ties, patched and paved railroad crossings, controlled weeds and brush, and removed and replaced track." (Decision, page 7.)

In contradistinction to these findings, Landowners know that the line is definitely not "capable of accepting shipper traffic at this time." On the contrary, Landowners contend that the line is and has for many years been totally out of service, that there is at least one bridge that could not possibly be used in conducting rail service, that portions of the track are not secured to ties, that some ties are not properly secured to solid, well maintained ballast and road bed; that in some locations, ties are missing or rotten, that portions of the road bed suffer from severe washing and erosion, that there has been almost no clearing of vegetation and weed control along the line for years, that trees are now growing between some ties, that trees have fallen on to the

the line for years; that trees are now growing between some ties; that trees have fallen on to the line and have not been removed, and that crossings have not been cared for under an acceptable maintenance program. Thus, if, as the Board suggests, the State's intentions regarding abandonment of the line can properly be discerned from the manner in which the State has maintained the line, evidence regarding such maintenance would only support Landowners' assertion that the State's intention clearly is and has been to abandon the line.

In addition, there is no evidence of record of which Landowners are aware regarding the amount of "time, effort, and money" the State has spent to assure that "the line is capable of accepting shupper traffic at this time" and, therefore, the Board's statement that "[a] party intending to take a line out of the national rail system would not spend the time, effort, and money on the line that South Carolina has invested here" cannot be supported based on the present state of the record.

Landowners believe that its request for an investigation is even more important now than it was when they first proposed it. At that time, Landowners thought such an investigation would be able to provide substantial evidence of record to describe the true condition of the line and what the State had done to preserve its asset for future rail use. Landowners also suggested that such an investigation would assist the Board in determining whether the filing of BRC's notice reflected BRC's stated intention to reinstitute rail service over the line or was in furtherance of a different plan not disclosed to the Board. All questions surrounding the filing of the BRC notice and the validity of its contents could have been answered through the investigation the

Landowners requested. Those purposes could still be achieved if the Board institutes the investigation Landowners sought and still seek.³⁹

SUMMARY AND CONCLUSION

In summary, Landowners encourage the Board to reconsider its March 19 decision and adopt findings consistent with the arguments Landowners are asserting in this Petition.

Landowners urge the Board to conclude that Tangent's notice of termination constituted an act of abandonment by the State of South Carolina consistent with decisions the Board has previously announced. See, *Pennsylvania Dep't of Transp. -- Abandonment Exemption -- Portion of Valley Branch*, Docket No. AB-373X, et al., and *Wisconsin and Calumet Railroad Company, Inc. -- Notice of Interim Trail Use and Termination of Modified Certificate*, STB

Finance Docket No. 30724 (Sub-No. 2). But if the Board continues to believe that additional evidence of the State's intent must be gathered, Landowners encourage the Board to conduct that inquiry through the type of investigation Landowners have sought since the start of their participation in this case. The Board's decision demonstrates overwhelmingly that the resolution of factual disputes may be extraordinarily important in this case and that decisive evidence should not be evaluated in this actively contested situation except on the basis of substantial evidence that is sworn to and subjected to cross examination by all that have an interest in this case.

³⁹ In addition, such an investigation could help determine, if it is still necessary, whether the State of South Carolina knew about, consented to, and therefore can be deemed to have joined in the filing of the termination notice filed by Tangent. Its instrumentality, if, contrary to Landowners' belief, filing of the notice by Tangent did not constitute a statement by the State of its intention to abandon the line.

Accordingly, Landowners respectfully request that the Board reconsider its March 19 decision and, if necessary, as part of its reconsideration, institute an investigation pursuant to Part 1115.5 to test the credibility of evidence which is of critical -- perhaps jurisdictional -- importance in this proceeding

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John L. Richardson". The signature is fluid and cursive, with the first name "John" being particularly prominent.

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CERTIFICATE OF SERVICE

I hereby certify that, on April 8, 2008, I caused a copy of the foregoing document to be served upon the following persons by first-class mail, postage prepaid

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